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William F. Caton, Acting Secretary
Federal Communications Commission
The Portals
445 12 th Street, S.W., TW-A325
Washington, D.C. 20554

Re: Early Period (1992-96) Compensation: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128; Colorado Payphone Association Petition for Reconsideration re Retroactive Adjustment of Intermediate Period Compensation

Dear Mr. Caton:

This letter amplifies the American Public Communications Council's ("APCC") earlier *ex parte* submission[1] showing that interexchange carriers ("IXCs") avoided millions of dollars in dial-around compensation payments to independent payphone service providers ("PSPs") between June 1, 1992 and November 6, 1996 ("Early Period") due to the Commission's erroneous determination that it lacked statutory authority to prescribe compensation for subscriber 800 calls.[2] In deciding what, if any, retroactive compensation adjustments are warranted by equitable considerations for the Intermediate Period (October 7, 1997 – April 21, 1999), the Commission must consider the revenue shortfall experienced by independent PSPs in the Early Period.[3] In the Early Period, as a result of the Commission's erroneous

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1 *See* letter from Robert F. Aldrich to Magalie Roman Salas, December 13, 2001 ("December 13, 2001 Ex Parte")(attached as Attachment 1 to this letter).

2 *Florida Public Telecommunications Association, Inc.* v. FCC, 54 F.3d 857 (D.C. Cir. 1995)("*FPTA*"). Subscriber 800 calls are calls to an 800 number assigned to a particular subscriber. The subscriber pays the IXC that it preselects to carry the call.

3 *See* Colorado Payphone Association's pending Petition for Reconsideration, filed April 21, 1999, seeking reconsideration of *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* Third Report and Order and Order on Reconsideration of the Second Report and

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interpretation of Section 226(e)(2), IXCs were able to avoid payment for all subscriber 800 calls, the majority of dial around calls. *FPTA*. To award retroactive refunds to IXCs for the Intermediate Period despite their massive avoided payments in the Early Period would unjustly enrich IXCs, who benefited from subscriber 800 calls originating from payphones in the Early Period but who did not compensate independent PSPs for the cost of originating such calls. Moreover, failure of the Commission to consider the Early Period would unfairly penalize independent PSPs who have been significantly undercompensated when considering all time periods together.[4]

Based on conservative estimates of the amount of compensation that would have been due for subscriber 800 calls during the Early Period if the Commission had correctly interpreted Section 226(e)(2) of the Act, 47 U.S.C. § 226(e)(2), independent PSPs who were clients of APCC's payphone compensation clearinghouse were undercompensated for subscriber 800 calls by approximately $82 million in the Early Period. By contrast, if (despite APCC's showing that PSPs were undercompensated in the Intermediate Period as well) the Commission were to conclude that independent PSPs should retroactively refund compensation to IXCs for the Intermediate Period, APCC's independent PSP clients would owe IXCs a total of approximately $33 million.[5] Neither of these estimates includes an estimate of interest on under- and over-payments. As a group, IXCs have underpaid independent PSPs by some $49 million, at least, when the Early and Intermediate

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Order, 14 FCC Rcd 2545 (1999)("*Third Payphone Order*"), *aff'd*, *American Pub. Com. Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000).

4 Independent PSPs have been undercompensated for dial-around calls in every time period under consideration in this proceeding, including the Intermediate Period. As APCC has explained in previous submissions, in the Intermediate Period independent PSPs failed to recover the cost of a marginal payphone even at the per call compensation rate of $.284 per call. *See, e.g.,* letter of March 26, 2001, from Albert H. Kramer to Dorothy Attwood ("March 26, 2001 Ex Parte). *See also* letter of April 15, 2002, to William F. Caton, Acting Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich re Standard for Granting Retroactive True-ups.

5 This calculation is based on the difference between the per call compensation rate of $.284 prescribed in the *Second Payphone Order* and the current rate of $.238. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 1778 (1997) ("*Second Payphone Order*"), *remanded, MCI Telecommunications Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998).

Periods are considered together.[6] Accordingly, as a matter of basic equity independent PSPs should not be required to pay refunds to IXCs for the Intermediate Period.

I. Background

While APCC is not requesting the Commission to order IXCs to pay additional compensation to compensate PSPs for the calls that were uncompensated during the Early Period, those uncompensated calls must be considered when deciding whether to order refunds for the Intermediate Period, and when deciding the amount of any refunds for the Intermediate Period.

Prior to 1992, independent PSPs only received revenue from coin payments for local calls and toll calls and from commissions paid by presubscribed operator service providers ("OSPs") for "0+" calls. Independent PSPs were not compensated for any dial-around calls. However, in the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), Congress directed the Commission to:

> . . . consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones.

47 U.S.C. § 226(e)(2). In its 1991 order implementing Section 226, the Commission concluded that IXCs who are operator service providers ("OSPs") should pay compensation to independent PSPs for originating interstate access code calls.[7] *See Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991). The Commission, however, did not require IXCs/OSPs to pay any compensation to PSPs for the origination of subscriber 800 calls, even though these calls are also dial around calls and independent PSPs have no alternative means of recovering the cost of originating such calls. *Id.* at 4745–46. The Commission reasoned that it had no authority under TOCSIA to prescribe compensation for subscriber 800 calls. APCC sought court review of the Commission's determination and the Court concluded

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[6] For the Interim Period, independent PSPs as a group were also undercompensated on balance. *See* Attachment 2, "Independent PSP Compensation 1992-1999."

[7] The major IXCs, such as AT&T, MCI, and Sprint, were all operator service providers and were thus subject to the Section 226(e)(2) compensation provision.

that the compensation provision of Section 226(e)(2) of the Act clearly encompassed subscriber 800 calls. *FPTA*, 54 F.3d 857. Thus, independent PSPs were improperly denied compensation for subscriber 800 calls for a total of approximately 53 months, from June 1, 1992 through November 6, 1996.

In initiating Docket No. 96-128, the Commission found that "the rules adopted in this proceeding will address the *Florida Payphone* remand." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, 11 FCC Rcd 6716, n. 42, ¶88 (1996). However, the retroactive aspect of the remand was never addressed. In the *First Payphone Order*, the Commission declined to apply Interim Compensation retroactively to the date of the *Notice of Proposed Rulemaking*, as APCC had proposed as a partial remedy for the compensation lost during the Early Period. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order*, 11 FCC Rcd 20541, ¶¶ 118, 126 (1996)("*First Payphone Order*"), *recon.* 11 FCC Rcd 21233 (1996)("*First Reconsideration Order*"), *vacated in part*, *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998). *See also* Comments of American Public Communications Council, July 1, 1996, at 39.

In summary, even though subscriber 800 calls were subject to compensation under TOCSIA, independent PSPs did not begin to receive compensation for such calls until November 7, 1996, when the compensation prescribed under Section 276(b)(1)(A) of the Act, 47 U.S.C. § 276(b)(1)(A), took effect.[8]

In order to estimate the total amount of compensation lost by independent PSPs and avoided by IXCs, the following discussion uses a very conservative

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[8] Section 226(e)(2) directed the Commission to "consider" requiring compensation for dial around calls, and thus arguably left it to the Commission's discretion whether to prescribe compensation for subscriber 800 calls. However, Section 276 of the Act has established that federal policy is for PSPs to be fairly compensated for every dial-around call, including subscriber 800 calls. This federal policy must guide the Commission's equitable analysis. Thus, in considering the consequences of the Commission's error in interpreting Section 226(e)(2) during the Early Period, for purposes of the Commission's equitable analysis of whether independent PSPs should pay IXCs a refund for the Intermediate Period, it is appropriate for the Commission to presume that independent PSPs would have been fairly compensated for subscriber 800 calls in the Early Period if the Commission had correctly interpreted Section 226(e)(2).

In order to estimate the total amount of compensation lost by independent PSPs and avoided by IXCs, the following discussion uses a very conservative approach to estimating what is, by any measure, a massive amount of unpaid compensation.

II. Independent PSPs Were Undercompensated by Roughly $80 Million, Without Even Taking Account of Interest, for Subscriber 800 Calls Between June 1992 and November 1996

APCC estimates that, if independent PSPs had been fairly compensated for subscriber 800 calls in the Early Period pursuant to Section 226(e)(2) of the Act, independent PSPs should have received approximately $82 million in additional compensation during the Early Period. *See* Attachment 3, "Estimate of Early Period Underpayment of Independent PSP Clients of APCC Services, Inc."

A. Average Compensable Call Volume

In order to determine the amount of compensation that IXCs should have paid independent PSPs in the Early Period, APCC begins by estimating the average volume of compensable access code and subscriber 800 calls that originated from payphones during that period. Because the end of the Early Period is also the beginning of the Interim Period, an estimate of the volume of compensable calls at the end of the Early Period can be developed from the average number of access code and subscriber 800 calls originating from payphones during the Interim Period. That number is 148 calls per payphone per month. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order on Reconsideration and Order on Remand, FCC 02-22, released January 31, 2002, ¶ 12.

The average call volume of 148 calls per month in the Interim Period must be adjusted to reflect that Section 226, which governed compensation in the Early Period, applies only to *interstate* calls. It is reasonable to assume that at least half of the dial-around calls were interstate calls compensable under Section 226(e)(2) of TOCSIA. Attachment 4, "Notes on Estimate of Early Period Underpayment of Independent PSP Clients of APCC Services, Inc.," ¶ 1. Thus, a reasonable estimate of the average number of compensable dial-around calls – including both the access code calls for which independent PSPs *were* compensated and the subscriber 800 calls for which independent PSPs erroneously were *not* compensated – originating from payphones at the end of the Early Period (in 1996) is 74 calls per payphone per month.

The next step is to estimate the average volume of compensable calls at the beginning of the Early Period. It would be reasonable to apply the Early Period estimate of 74 calls as the monthly volume of interstate access code and subscriber 800 calls throughout the Early Period. However, it also could be argued that toll-free calling and the use of access codes were not as prevalent at the beginning of the Early Period as they were at the end of the period. In order to be conservative and to err on the side of underestimating the total volume of dial-around calls, APCC has developed an estimate of total interstate access code and subscriber 800 calls for the beginning of the Early Period, based on the number of interstate access code calls estimated by the FCC in its *1992 Compensation Order*, multiplied by the estimated average ratio of subscriber 800 calls to access code calls. *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, 7 FCC Rcd 3251 (1992) (the "*1992 Compensation Order*").

According to the *1992 Compensation Order*, the average number of interstate access code calls originating from payphones was 15 calls per payphone per month. *1992 Compensation Order* at 3257, ¶ 36. In APCC's December 13, 2001 Ex Parte, the APCC produced results of three surveys which demonstrated that the ratio of subscriber 800 calls to access code calls ranged from 2:1 to 3:1. *See* Attachment 1. Once again being conservative and assuming that the ratio of interstate subscriber 800 calls to interstate access code calls at the beginning of the Early Period was only 2:1, it is estimated that the average number of interstate subscriber 800 calls originating from payphones in 1992 was roughly 30. Therefore, it is reasonable to estimate that total interstate dial-around calling in the first quarter of the early period was approximately 45 calls per payphone per month. Attachment 4, ¶ 2.

With 45 calls per payphone per month in the first full quarter of the Early Period, and 74 calls per payphone per month at the end of the period, the next step is to estimate the average number of compensable calls during the intervening quarters. It is reasonable to plot the call volumes for the intervening quarters as increasing at a constant rate of growth from 45 to 74 calls per payphone per month. *Id.*, ¶ 3. The resulting estimated call volumes for each quarter, increasing at a constant growth rate of approximately 3% per quarter, are shown in Attachment 3. The median call volume for the period as a whole, estimated by this method, is about 57 calls per payphone per month.

B. Applicable Rate

It is then necessary to assign a per call rate for purposes of estimating total compensation for this period. One possible approach is to assign the same rate that the Commission assigned to access code calls. In the *1992 Compensation Order* the

Commission determined that a compensation rate of $.40 per access code call was reasonable. *1992 Compensation Order* at 3257, ¶¶ 40-41.

Another, more conservative, approach is to assign a per-call rate to subscriber 800 calls equal to the current per call compensation rate of $.238. This rate is designed to "ensure that each call at a marginal payphone location recovers the marginal cost of that call plus a proportionate share of the joint and common costs of providing the payphone." *Third Payphone Order*, 14 FCC Rcd at 2571 (1999).

Again erring on the side of the more conservative assumptions, APCC assigns the lower rate of $.238 per call as the rate that should have applied to the compensation of interstate subscriber 800 calls. APCC further assumes that interstate access code calls also would have been compensated at the $.238 rate, rather than the $.40 rate actually applied, if the Commission had prescribed compensation for all interstate dial-around calls during the Early Period. Attachment 4, ¶ 4.

C. Underpayment

Using the method described above, APCC has estimated the total monthly per-phone compensation that independent PSPs should have received in each quarter of the Early Period, which ranges from $10.71 at the beginning of the period to $17.61 at the end. *See* Attachment 3. To determine the monthly underpayment per phone, it is necessary to subtract from these amounts the actual prescribed rate, which for most of the Early Period was $6.00 per payphone per month.[9]

The underpayment for each quarter of the Early Period, calculated by this method, is shown on Attachment 3. The median underpayment of independent PSPs during the Early Period is approximately $7.50 per payphone per month. The total per-phone underpayment for the Early Period is about $408. The total

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[9] Beginning in late 1994, AT&T and Sprint were granted waivers to switch from paying per-phone compensation to paying per-call compensation, at the rate of $.25 per call. APCC's payment records indicate that, as a result, the amounts collected by PSPs during the period when these waivers were in effect averaged less than the $6.00 per payphone per month originally prescribed by the Commission. To simplify the calculation, and again erring on the side of underestimating total undercompensation, APCC is not including this reduction in the total compensation, and is assuming that the $6.00 per month payment was collected throughout the Early Period. The result is to underestimate the amount of undercompensation.

amount by which APCC-represented independent PSPs were undercompensated in the Early Period, without even taking account of interest, is approximately $82 million. To this amount, interest must be added for the average seven-year period for which independent PSPs have been deprived of these funds.

III. The Unpaid Compensation for the Early Period Exceeds the Maximum Possible Refund for the Intermediate Period by a Factor of Two

The $82 million underpayment for the Early Period greatly exceeds any refund that independent could conceivably "owe" IXCs for the Intermediate Period. Accordingly, the equities dictate that independent PSPs not be forced to refund IXCs any compensation.

APCC has previously demonstrated that even without taking into account the compensation that IXCs should have paid independent PSPs for subscriber 800 calls during the Early Period, no refund is warranted for the Intermediate Period. *See* March 26, 2001 Ex Parte. Among other reasons why this is the case, even at the $.284 rate in effect during the Intermediate Period, independent PSPs did not recover their costs in the Intermediate Period. Based on actual compensation data, APCC showed that only about 69% of the compensation that the Commission found necessary to recover marginal payphone costs was already paid. Compensation was paid, APCC estimated, on average for only about 109 out of 142 monthly calls at a marginal payphone, and the average monthly payment for a marginal phone was only $27.55 instead of the $33.80 necessary to recover marginal payphone costs under the cost analysis adopted in the *Third Payphone Order*. If PSPs were required to refund $.046 per call, cost recovery would drop even lower, to $23.09 per month. *Id.* Therefore, independent PSPs should not be forced to incur further losses by refunding compensation to IXCs.

As shown below, however, even if the Commission disregards independent PSPs' inability to recover their costs during the Intermediate Period, the maximum amount of the refund to which IXCs would be entitled for the Intermediate Period is approximately $33 million. This "overpayment" is dwarfed by the $82 million that IXCs should have paid independent PSPs for subscriber 800 calls during the Early Period.[10]

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[10] This amount does not take into account interest that IXCs should pay independent PSPs to compensate independent PSPs' for their loss of the use of the money that should have been paid. Interest would be significant since the time period in question dates back six to ten years.

The amount of per phone compensation that APCC-represented independent PSPs would have to refund to IXCs for the Intermediate Period – assuming that independent PSPs must refund the difference between the \$.284 and \$.238 rates (or \$.046) – can be estimated by multiplying APCC's total receipts from IXCs for that period – about \$205 million – by .046/.284. The result is about \$33.2 million. This is far less than the \$82 million by which IXCs undercompensated APCC-represented independent PSPs in the Early Period. The addition of interest payments would widen the gap even more, as the Early Period is about four years earlier, on average, than the Intermediate Period.

The Commission's analysis of the equities of ordering independent PSPs to refund IXCs must be guided by Congress's directive in Section 276 of the Act that PSPs be fairly compensated for each and every call originating from their payphones. 47 U.S.C. § 276(b)(1)(A). As noted, independent PSPs have been grossly undercompensated for dial around calls in every compensation period, and thus should not be required to pay refunds to IXCs for any period. But even if the Commission were to find that independent PSPs were overcompensated for the Intermediate Period, the amount of such overcompensation must be offset by the amount of the total underpayments to independent PSPs during the Early Period. The total underpayments for that period are so much larger that it is difficult to imagine what equitable purpose could be served by requiring independent PSPs to pay refunds for the Intermediate Period.

Sincerely,

Albert H. Kramer
Robert F. Aldrich

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